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No. 550

In the Supreme Court of the United States

OCTOBER TERM, 1968

S. DEAN SLOUGH, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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After full administrative proceedings, the Federal Trade Commission found that petitioner had engaged in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act and ordered him to cease and desist (R. 73–107).[1] The Commission's findings and order were upheld by the court below (Pet. App. 1a–3a, 7a). The court's opinion is reported at 396 F. 2d 870.

1. Petitioner, an Illinois entrepreneur who changed his first name from "Earl" to "State," sold debt-col-

[1] "R" refers to Volume 1 of the Printed Record in the Court of Appeals. "JA" refers to the joint appendix compiled as Volume II of that Printed Record. "CX" refers to Commission exhibits not included in the joint appendix.

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lection forms in some 15 States under the trade name, State Credit Control Board (R. 80). Creditors filled out these forms and petitioner arranged to have them mailed for the creditor from the capital city of the creditor's State (R. 81).

The "debt-collection package" which petitioner sold to creditors consisted of eleven different letters, reports and notices (R. 81). Three of the forms were small reminder slips for the creditor to attach to regular monthly statements (JA 179–181).[2] For cases of more than six months' arrearage, petitioner's package included a series of three collection letters (JA 173), two forms aimed at the debtor's employer (JA 169; CX 5, R. 10), and a "Final Notice before Entering Suit" form (R. 11).[3]

Each letter in the package contained the letterhead "State Credit Control Board," a post office address in the capital city of the creditor's State, and a symbol resembling a seal (R. 81).[4] Each letter and the "Final Notice before Suit" form contained a statement in red ink, "Referred to file of County Agent," beneath which the creditor was instructed to fill in the

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[2] The reminder slips contained no reference to petitioner, except for a warning in the third slip that the account will be turned over to "State Credit Control Board" for collection unless payment is forthcoming within ten days (JA 181).

[3] In addition, the package included a "Past Due Notice" (JA 168) to be sent to those who had made arrangements for payment and then failed to keep them, and a "Bad Check Notice" (JA 171).

[4] It depicts a blindfolded goddess of justice with the phrase "Credit Protection" arched over her head and the inscription, "An Independent Collection Service," printed in smaller type beneath the goddess reading upside down and backwards (R. 9–11, 81–82).

name of the petitioner's local salesman and the county of the debtor. To the right and beneath the letterhead was a box containing the phrase, "For County [or 'Co.' in a later edition] Agent Use Only," and thereunder space for the following entries: "Date Serving Writ"; "Writ Returnable"; "Date of Judgment"; "Name of Court Judge"; and "Date Sheriff's Notice." (R. 82.) The collection letters and the forms to be sent to employers bore the signature of E. Dean Slough (S. D. Slough in later versions), who was designated as "District Director," or in later forms as "Director" (R. 81).

The language of the collection letters suggests that they originated with the State Credit Control Board, not the creditor (R. 83). For example, the letters referred to the creditor in the third person (R. 82–83) and one letter said, "Our (State Credit Control Board) Representative is making a preliminary survey * * * previous to considering the taking of legal action to effect settlement on delinquent claims" (R. 82). The creditor was instructed to insert each letter into an envelope provided by the petitioner bearing petitioner's return address and to put the debtor's address on the envelope, together with a stamp, and then send it under separate cover to the petitioner's office in the capital city of that State for mailing to the debtor (R. 83).

The Commission, in a unanimous opinion, concluded that petitioner's practices constituted "misrepresentation to debtors that their creditors had referred their delinquent accounts to third persons—a material de-

ception in violation of Section 5" (R. 94).[5] The Commission also found that petitioner falsely conveyed the impression that it "is a governmental entity of some kind or has some governmental affiliation" (R. 87).[6]

Based on these findings, the Commission ordered petitioner to cease and desist from (1) using words or abbreviations that suggest affiliation with a governmental agency; (2) mailing letters or notices to a person indebted to a third party without actual authority from the creditor (which the petitioner must specifically disclose to the debtor) to collect or compromise the debt; (3) selling form letters or documents which in any way imply that a delinquent account has been referred to petitioner or any other third party for collection; (4) authorizing any creditor to use petitioner's name or trade name in connection with any debt-collection activity; (5) representing that any legal or other action will be instituted to effect collection or reflect unfavorably on the credit rating of the debtor unless peti-

[5] The Commission found that third-party referrals of delinquent accounts are an important device in collection of past-due accounts because debtors are thereby led to believe that their creditors will no longer extend them credit and that legal action will probably be taken to collect the debt. Petitioner's packet of letters, in the Commission's view, was designed to reinforce this assumption (R. 91–92).

[6] The Commission concluded that petitioner's effort to hold himself out as a governmental agency is likely to create an assumption in the debtor's mind that his delinquent account has already been turned over to public authorities for action. This, the Commission concluded, could easily convey the impression to many debtors "that legal action by the State was imminent, or indeed already pending against them." (R. 95.)

tioner has specific "authority and good faith intent to take any represented action * * *" (Pet. App. 4a–5a).

The court of appeals unanimously affirmed, holding that the Commission's findings were supported by the record and that the order is not lacking in reasonable relation to the unlawful practices found.

2. Petitioner contends that the Commission should not have barred him from using his trade name, "State Credit Control Board." The Commission properly concluded, however, that this remedy was needed because of the serious deception it found. Petitioner's extensive efforts to establish and maintain the impression that his private business had some kind of governmental status are summarized above. This elaborate scheme was designed to deceive the public into believing that petitioner's operation was far more than what it actually was—a private business that printed and sold stationery and form letters to businessmen seeking to obtain payment of past-due debts.

In light of petitioner's "unusual dogged diligence not to yield on its use of these deceptive practices" (R. 96), the Commission was justified in issuing a broad remedial order designed to assure a prompt and certain end to petitioner's deceptive operations. Where, as here, the offending deception is caused by the inherent falsity of the trade name, the Commission is not compelled to rely on the possibly confusing and ambiguous remedy of directing the addition of qualifying words, but may instead eliminate the cause of the deception by ordering the trade name's excision. *Federal Trade Commission* v. *Algoma Lumber Co.*; 291 U.S. 67, 81–82; *Continental Wax Corp.* v.

Federal Trade Commission, 330 F. 2d 475, 479–480 (C.A. 2).

3. Petitioner also contends that the Commission's order is unduly broad because it restrains him from engaging in lawful activities relating to his debt-collection business. These are not specified in the petition, but apparently the reference is to prohibitions against engaging in "skip-tracing" activities[1] and against representing that a debt has been referred to petitioner by the creditor for collection and that petitioner will file suit if it is not paid. The Commission has authority to restrain even lawful practices related to the illegal acts if this is necessary to achieve effective relief. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–430; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. In light of petitioner's testimony that he intended to resume his business on a large scale and offer a complete debt-collection service (R. 101), the Commission's conclusion that broad restrictions were needed to assure effective relief and to prevent a recurrence of the violation was reasonable and within its authority. See *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394–395.

Contrary to petitioner's claim, the Commission has not shifted to him the burden of proving in any future enforcement proceeding that he has complied with the Commission's order. The order prohibits him from engaging in specific acts and from making cer-

[1] The court below defined skip-tracing as "the collection-agency practice of tracing down debtors whose whereabouts have become unknown" (Pet. App. 2a, n. 2).

tain specific representations. Its proviso declares, however, that these activities and representations shall not be unlawful if petitioner shows that "it is engaged in the bona fide collection of delinquent accounts, has the authority and good faith intent to take any represented action, and the specific account in question has been referred to it for collection * * *" (Pet. App. 5a–6a). Such a proviso does not shift the burden of proof; it merely permits petitioner to make representations of the kind that previously were false, if he can show that they are now true. See *Colgate-Palmolive Co.* v. *Federal Trade Commission*, 326 F. 2d 517, 523–524 (C.A. 1), reversed on other grounds, 380 U.S. 374; cf. *Federal Trade Commission* v. *Ruberoid Co., supra*, 343 U.S. at 476.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

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[8] There is no conflict with *Federated Nationwide Wholesalers Service* v. *Federal Trade Commission*, 393 F. 2d 253 (C.A. 2) (Pet. App. D). In that case representations which the Commission prohibited—that respondent was a wholesaler—were in fact true with respect to a substantial portion of his business, which was both wholesale and retail. In the instant case, however, the record discloses no circumstances in which the petitioner's representations could be considered truthful under petitioner's existing business procedures.

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